No. 17350

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID FARRELL, *et al.*,

Appellants,

vs.

GEORGE E. DANIELSON, *et al.*,

Appellees.

APPELLEES' REPLY BRIEF.

WILLIAM J. TIERNAN,
215 West Seventh Street,
Los Angeles 14, California,
GENDEL & RASKOFF,
6435 Wilshire Boulevard,
Los Angeles 48, California,
BURKE MATHES,
453 South Spring Street,
Los Angeles 13, California,

Attorneys for Appellees George E. Danielson, James A. Smith, Stanley A. Phips, Trustees in Bankruptcy.

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POINT I.

THE APPELLANT CONSENTED TO THE ENTRY OF THE PRELIMINARY INJUNCTION.

Argument.

By an Order of this Court, there has been filed for consideration, a transcript of the proceedings held in the United States District Court before the District Judge on January 30, 1961. The transcript on file contains a number of matters. The question of the issuance of a preliminary injunction commences on page 39 at line 8 and continues through and including page 46, line 7.

A reading of the exchange between the Court and counsel indicates quite clearly that counsel for the Appellants consented to the issuance of a preliminary injunction in order to maintain the *status quo* of the pro-

ceedings pending a trial and pending the substitution of Trustees in Bankruptcy. [Page 44, line 12.]

> "Mr. Cuthbertson: There was no hearing on that at any time. No hearing on the temporary restraining order. It was issued *ex parte*. However, we are perfectly willing that a restraining Order issue." [Page 44, line 24.]
>
> "Mr. Cuthbertson: We have no objection to being restrained in that connection. Mr. Farrell has no intention of running away with it." [Page 46, line 3.]
>
> The Court: And a temporary injunction will be issued pending that restraining the defendant from selling the airplane.
>
> Mr. Young: "I will prepare Findings of Fact and serve it on counsel and submit it to your Honor."

In view of the exchange taken from the record of the Court and in view of the positive assertion of counsel for the Appellants regarding the consent to the issuance of a preliminary injunction it would appear to the undersigned that many of the arguments and statements of counsel contained in the opening Brief are somewhat pallid.

This is true, as well, of the statements of counsel for Appellant regarding the deposition of David Farrell wherein he states in his Brief that the deposition was never offered, never read into the record not considered by the trial Judge in the making of the Find-

ings of Fact, Conclusions of Law and Preliminary injunction.

The transcript, page 41, line 2:

Mr. Young: "So at this time, I wish to make an Order for the continuation of the Order pendente lite for the preliminary injunction and do now offer into evidence a transcript of the testimony of David Farrell which is in the hands, I believe of the Clerk and which we had at the last hearing and asked that it be received in evidence. And based upon that evidence, I asked the Court for permission to draw Findings of Fact in harmony with the evidence shown so that we may get a preliminary injunction based upon Findings of Fact to continue in effect the injunction that we have so that our successor in interest, the Referee in Bankruptcy, the Trustee in Bankruptcy will be fully protected against any of these transfers."

The Court: "Is there any objection to this method of maintaining the status quo which has to be maintained and which will leave everybody in a position of asserting the same rights in the Bankruptcy Court with the review by me sitting as a District Judge?" (No objection voiced by Mr. Cuthbertson).

POINT II.

AN INJUNCTION IS ISSUED TO PREVENT PROBABLE DAMAGE TO A PLAINTIFF IN AN ACTION PENDING THE OUTCOME OF A TRIAL ON THE MERITS INVOLVING THE ENTIRE CONTROVERSY.

Argument.

An injunction is recognized as an unusual device and one which inheres in a court of equity or any court for that matter in order to protect the litigants from loss, damage or the destruction of a right pending a determination of the controversy in chief.

An injunction of a preliminary type is frequently issued to maintain the *status quo*. Such is the type of injunction which was issued in this case. It is normally issued by the Court when the damages or loss to the plaintiff far exceed or outweigh the damage or loss to the defendant which might result or accrue in the event such an injunction were not to be issued.

Ross Whitney Co. v. Smith Kline & French Laboratory (C. A. 9, 1953), 207 F. 2d 190.

POINT III.

THE ISSUANCE OF AN INJUNCTION IS ENTIRELY DISCRETIONARY WITH THE TRIAL JUDGE.

Argument.

No argument is necessary on this point. It is a recognized principle of law surrounding the issuance of preliminary injunctions.

See the case of

Lane Bryant v. Maternity Lane (C. A. 9, 1949), 173 F. 2d 559.

POINT IV.

THE FINDINGS OF FACT RECITED BY THE DISTRICT JUDGE ARE NOT TO BE REVERSED OR UPSET UNLESS THEY ARE "CLEARLY ERRONEOUS".

Argument.

While the rules of procedure require the making of Findings of Fact and Conclusions of law in connection with the issuance of a preliminary injunction, the scope of appeal is the same as any other appeal wherein the Findings of Fact are to be reviewed. In the making of preliminary injunctions however, sometimes affidavits are considered or other somewhat less formal methods of proof. The Findings themselves are of a preliminary nature, their only significance is to support the preliminary injunction made. In the case at Bar, the deposition of David Farrell was filed with the Clerk and by consent was considered as the evidence which would have been introduced at the cause in support of the injunction. The Findings of Fact and Conclusion made are clearly supported by a reading of the deposition of David Farrell. The Findings made by the Judge may be made as a result of direct or inferential evidence and are not to be reversed unless such Findings are within the rule as being clearly erroneous.

Champion Spark Plug Co. v. Reich (C.C.A. 8, 1941), 121 F. 2d 769. Certiorari denied 314 U. S. 669.

POINT V.

ON APPEAL OR ON REVIEW OF AN ORDER RELATING TO A PRELIMINARY INJUNCTION, THE APPELLATE COURT WILL GO NO FURTHER THAN NECESSARY TO DISPOSE OF THE APPEAL.

Ross Whitney Corporation v. Smith, Kline & French Lab. supra.

POINT VI.

The other points covered by counsel in his Brief regarding a violation of Rule 65 of the Federal Rules of Civil Procedure are within the framework of the Rule of harmless error. Deviation from proper procedure in connection with the issuance of the decree or a preliminary injunction which are non-prejudicial in nature, do not constitute grounds for reversal.

Swift v. Black Panther Oil Co. (C. A. 8, 1917), 244 Fed. 20;

In re Lustron Corporation (C. A. 7, 1950), 184 F. 2d 789, certiorari denied 340 U. S. 946; etc.

The Findings, conclusions and decree follow the language of the complaint. Since counsel consented he may not now object.

It is respectfully submitted that the Preliminary Injunction was properly issued and the appeal should be denied with costs to the Appellee.

WILLIAM J. TIERNAN,
GENDEL & RASKOFF,
BURKE MATHES,

Attorneys for Appellees George E. Danielson, James A. Smith, Stanley A. Phips, Trustees in Bankruptcy.